No. 83-1580

IN THE

Supreme Court of the United States

October Term, 1983

CASPER CITRON, STEVEN CASPER HENRY CITRON, and ALISANDE CITRON SLIVKA,

Petitioners,

against

FIONA GRAHAM CITRON, M.D.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reasons for Denying the Application for a Writ of Certiorari

The instant case raises the issue of the correctness of the Circuit Court's definition of "willfully" within the context of a criminal statute. The definition employed is drawn almost entirely from this Court's prior and oft-cited ruling in *United States* v. *Murdock*, 290 U.S. 389 (1933).

The petitioners present neither a compelling nor logical argument to support their contention that this Court's ruling in the *Murdock* case is inapplicable to the federal wire-

tap statute which prohibits willful interceptions. Indeed, the Senate Report accompanying Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifically adopted the *Murdock* definition of "willfully" in defining the term within the context of the statute here in question. Under these circumstances, the ruling below is totally accurate and ought not be reviewed.

Statement of the Case

Respondent intercepted her husband's and her adult stepchildren's telephone conversations by means of a self-activating recording device which she had purchased through a *New York Times* advertisement. The first recorded interception, however, was personally activated by the wife as she overheard her husband's telephone conversation while he was using the telephone in the bathroom adjoining the marital bedroom.

The wife took the recorded conversation to her matrimonial lawyer's office and inquired about the legality of the interception. She was told not to worry about it. Consequently, she intercepted numerous other conversations using the recording device.

After several interceptions, the wife again consulted her attorney and was told that "the tapes couldn't be used in evidence but they could be used to find clues, to know where to look for clues". The taping continued.

It was only after the husband discovered the tapes and such discovery was conveyed to the wife's attorney, that

the attorney told the wife the interceptions were illegal. There were no further interceptions after that advisory.

The jury, responding to special interrogatories, specifically found that while interceptions were made the defendant's conduct was not willful.

POINT I

The Circuit Court of Appeals' Decision, Which Clarified the Meaning of "Willfully" as Used in a Criminal Statute, Was Entirely Consistent With Well-Established Principles. (Responding to Petitioners' Point I)

The thrust of the defense in this civil wiretapping action was that the conduct of the defendant wife was not "willful" and thus not culpable. That proposition, based as it was upon substantial credible evidence, was ratified by the jury verdict, the Trial Court and the Second Circuit Court of Appeals.

Petitioners mistakenly assume, however, that the Circuit Court of Appeals' decision established "ignorance of the law [a]s an excuse for conduct willfully undertaken in violation of the law" (Petitioners' brief, p. 7). In fact, the decision never mentioned the proposition, nor could any reasonable inference cull from it such a tortured reading. The Court below ruled upon the meaning of the term "willfully" when applied to fix civil liability for unlawful wiretapping, *viz.*, *Citron* v. *Citron*, 722 F. 2d 14, 15:

> We write only to clarify the meaning of "willfully" in §2511 (criminal wiretap statute) when the statute is invoked to impose civil liability under §2520.

In its careful decision, the Court below made specific reference to the definition of "willful" established by this Court in *United States* v. *Murdock*, 290 U.S. 389, 394-95 (1933) and the Congress' specific adoption of the *Murdock* definition in employing the term "willfully". By considering the text of the statute and its legislative history, the Circuit Court reasoned it did not seem logical that the same term, willfully, in the same statute, §2511, should have any different meaning when applied directly to a criminal violation than when the same violation is incorporated by reference to establish civil liability. *Citron*, 722 F. 2d at 16.

Ignorance of the law, contrary to the Petitioners' brief, was never the defense in the case. However, ignorance of the law can be considered in determining whether there exists the specific intent necessary for a violation of the law charged. *United States* v. *McIntyre*, 582 F. 2d 1221 (9th Cir. 1978). The question before the jury in this case was not whether the defendant thought her conduct was legal, but whether her state of mind was "willful".

Petitioners' belief that the Circuit Court decision establishes ignorance of the law as a defense is, simply stated, misplaced and wrong.

POINT II

There Is No Conflict of Opinion Among the Circuits Regarding the Meaning of "Willfully" as Used in the Statute. (In Opposition to Petitioners' Point II)

In support of its position, the petitioners rely upon two Circuit Court rulings which are totally inapposite to their contentions: Those cases dealt with law enforcement officials who relied principally on the good faith defense.

In *Campiti* v. *Walonis*, 611 F. 2d 387 (1st Cir. 1979), prison officials, with knowledge of the federal wiretap statute, monitored an inmate's call to a third party. These prison officials believed that their conduct was perfectly legal. In its opinion, the Circuit Court ruled that the key issue was whether the interceptions fell within the meaning of the phrases "in the ordinary course of business" or "in the ordinary course of duties" of a law enforcement officer.[1] The Court found that the monitoring was an exceptional course of conduct for the defendant prison officials and that "18 U.S.C. §2510 (5)(a)(i) does not provide the basis for a 'prison exemption' from the Act." *Campiti* at 392. The Court went on to say: "What we have here is action taken not in reliance on legislative authorization, but on a completely erroneous belief that the statute did not apply to an

1. In pertinent part, 18 U.S.C. §2510(5)(a)(i) provides:

"Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business.

extension phone or to prison officials," at 395.[2] More to the petitioners' point here, the *Campiti* Court held, "Since there was no 'court order' or 'legislative authorization' a literal reading of the statute eliminates any good faith defense". 611 F.2d at 394.

Clearly, the facts and holdings in the *Campiti* case are totally dissimilar from the case *sub judice*. The petitioners' argument that the *Campiti* case "holds that ignorance of the law is not an excuse, that the willfulness required by the statute is satisfied by the deliberate and knowing undertaking of the course of conduct regardless of ignorance of criminality, and even in the presence of a good faith belief in lawfulness" (pp. 10-11, Petitioners' brief) is a gross perversion of the decision. For brevity's sake we decline to enter the confused muddle created by petitioners' misinterpretation of *Campiti*.

Secondly, the contention at p. 11 of petitioners' brief that the Ninth Circuit in *Jacobsen* v. *Rose*, 592 F. 2d 515 (1978) held "exactly contrary" to the Second Circuit regarding punitive damages is befuddling. The Second Circuit did not rule on the quantum of proof necessary to sustain exemplary damages. Thus it could not possibly be in conflict with the Ninth Circuit's ruling on that issue. Besides, the quantum of proof necessary for punitive damages became a non-issue once the jury, by its special verdict, found respondent's actions not willful.

The Second Circuit's definition of the term "willful," as used in the applicable statutes, is clearly consistent with

2. We note that this sentence was omitted by petitioners at p. 11 of their brief when quoting from *Campiti*, although the sentence immediately precedes and clarifies the quotation.

this Court's prior rulings and the intent of the Congress. See, generally, *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976); S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. and Ad. News 2112, 2181.

POINT III

The Holding by the Second Circuit Does Not Create an Ambiguity in the Statute. (In Opposition to Petitioners' Point III)

Petitioners rely upon *Campiti* v. *Walonis*, *supra*, and *Jacobsen* v. *Rose*, *supra*, to support their contention that the Second Circuit's definition of "willful" improperly creates an additional good faith defense. Once again, petitioners' reading of the cases is erroneous.

The *Jacobsen* Court had before it a factual pattern establishing that after the issuance of a wiretap order terminating 30 days from its date, a revised order was issued which retained the original termination date. Certain of the police officer defendants never saw the revised order but believed that it terminated 30 days from its date rather than from the original termination date. The Ninth Circuit reversed as to telephone company employees on "good faith defense" grounds and remanded the issue for trial. It also reversed as to certain police officers who had relied upon their superior's direction that the wiretap was valid, on "good faith defense" grounds and remanded the issue for trial.

The *Campiti* Court's determination, revolving as it did about the good faith defense, is consistent with the *Jacobsen*

holding and both of these cases are thoroughly inapplicable to the ruling in *Citron*.

The good faith defense is available solely to law enforcement officials and those who cooperate with them. Since the respondent wife is neither, the defense is not applicable to her: Nor was it relied upon. The fact that the definition of "willful" by the Second Circuit covers much of the same ground as the "good faith defense" does not, *ipso facto*, create an additional good faith defense. The definition of the terms are consistent with each other and honors the congressional design.

Conclusion

Where, as here, a Circuit Court of Appeals defines the term "willfully" as used within the context of a criminal statute and such definition is clearly consistent with this Court's prior rulings and the legislative intent, there is no pressing reason to grant the extraordinary relief sought by way of a Writ of Certiorari.

Dated: White Plains, New York
April 17, 1984.

Respectfully submitted,

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